



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE:

MAR 07 2013

OFFICE: TEXAS SERVICE CENTER FILE:

IN RE:

Petitioner:

Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on February 17, 2012, the AAO dismissed the appeal. Counsel to the petitioner filed a motion to reopen and a motion to reconsider on March 26, 2012 the AAO's decision. The director issued a dismissal. The director's decision will be withdrawn. The petitioner's motion to reopen and motion to reconsider will be dismissed as untimely filed.

The AAO dismissed the appeal on February 17, 2012, finding that the petitioner had not established its continuing financial ability to pay the proffered wage and additionally concluding that the petitioner had not demonstrated that the beneficiary possessed the requisite employment experience as set forth on the labor certification. It is noted that the cover sheet of the AAO's February 17, 2012, decision, instructed the petitioner about the process to file a motion to reconsider or to reopen with instructions to file any motion with the office that *originally* decided the case if it believed the law was inappropriately applied by the AAO in adjudicating the appeal. (Emphasis added). The record indicates that the petitioner incorrectly filed its motion to reopen and motion to reconsider with the AAO instead of the Texas Service Center that rendered the original decision. The petitioner subsequently submitted it to the Service Center on March 26, 2012, or 38 days past the deadline.

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). Similarly, USCIS regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. *Id.* A timely motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A timely motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion that does not meet the applicable requirements will be dismissed. 8 C.F.R. § 103.5(a)(4).

It is noted that the Texas Service Center director erroneously determined the timeliness of the petitioner's March 26, 2012 motion to the AAO and issued a dismissal on June 13, 2012. As the director has no jurisdiction to determine the timeliness of a motion to the AAO,¹ the director's decision will be withdrawn. It is observed that the petitioner's corresponding July 10, 2012, motion to reconsider the director's decision of June 13, 2012, which was filed with the director, would also have no effect.

It is finally noted that the AAO has no authority to accept the petitioner's March 26, 2012, untimely motion on the February 17, 2012, decision by the AAO as the motion fails to hold a timely filing date due to its submission to the wrong jurisdiction. Further, there has been no persuasive demonstration that the failure to file a timely motion to reopen was reasonable or beyond the control

¹ The regulations only give the director the jurisdiction to determine the timeliness of an appeal to the AAO insofar as the director may treat an untimely appeal as a motion. 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

of the party. As indicated above, the motion was due on March 21, 2012, but was not properly filed until March 26, 2012, or 38 days past the AAO's February 17, 2012 decision. The petitioner's motion to reopen and motion to reconsider will be dismissed as untimely.²

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be dismissed as untimely, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen and reconsider is dismissed as untimely.

² It is noted that even if not dismissed for untimeliness, the AAO does not concur with the petitioner's assertions on motion that the petitioner's net assets are somehow shown on the petitioner's tax returns submitted to the record. According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. These specific delineations are not set forth on the kind of tax returns submitted by the petitioner. Nor were audited financial statements ever submitted to the record as permitted in the regulation at 8 C.F.R. § 204.5(g)(2). The AAO's decision relevant to the petitioner's ability to pay the proffered wage remains as rendered.

With regard to the petitioner's interpretation of the Form ETA 750's related occupation work experience requirement of "public performance experiences" as meaning some indeterminate number of performance experiences during a five-year period rather than five full-time years of performance experiences, the AAO would not change its decision in this regard without examining the petitioner's recruitment materials and correspondence with DOL that would affirm how this requirement was actually presented to DOL and to otherwise qualified U.S. workers. Such documentation has never been submitted.